



Via Fax ((202) 418-3475) and U.S. Mail

June 3, 2004

Public Comment on Preliminary Report
U.S. Commission on Ocean Policy
1120 20th Street, NW
Suite 200 North
Washington, D.C. 20036

Re: Preliminary Report of the Commission on Ocean Policy

The National Aquaculture Association members appreciate the opportunity to provide comments on the Commission's Preliminary Report. The National Aquaculture Association ("NAA") supports the Commission's efforts to highlight the importance of developing a viable national policy to address the need for marine aquaculture. Members of the NAA look forward to working with federal agencies to establish a program that will assist the United States in meeting the seafood demand of present and future generations.

The following are the comments of the NAA with respect to the topics noted.

Antibiotics in Aquaculture and "Contaminated Seafood"¹

- The draft Ocean Commission Report relies on unreliable, poorly documented comments and innuendo to help justify recommendations regarding marine aquaculture. In so doing, they have diminished their credibility and slandered existent aquaculture and various federal programs designed to ensure public health and environmental safety are maintained. For example, the report cites popular press such as the San Jose Mercury News or environmental organization non-scientific publications such as "Murky Waters" to support their claims. The report fails to recognize the scientifically rigorous US Food and Drug Administration (FDA) drug approval process. There are very few drugs approved for use in aquatic animal farming in the United States and only two antibiotics are approved. The report states that antibiotics used in aquaculture will harm the surrounding environment. In fact, there is no credible scientific literature documenting environmental harm from the extremely low concentrations of antibiotics occurring in the environment due to treatment of aquatic animals. The report mistakenly states that antibiotics are used to protect fish (i.e. used prophylactically). In fact, the only antibiotics

1180998v7

111 W. Washington Street, Suite 1, Charles Town, WV 25414
Tel: 304/728-2167 Fax: 304/728-2196 E-mail: naa@frontiernet.net
Website: www.nationalaquaculture.org

approved for use in the U.S. domestic aquaculture industry are approved to treat specific bacterial diseases in specific kinds of aquatic animals. The report mistakenly states that hormones are used in aquaculture to promote growth. In fact, there are no U.S. FDA approved hormones for growth promotion of aquatic animals. The report fails to identify the ongoing efforts of the federal Joint Subcommittee on Aquaculture to develop a national aquatic animal health plan. Further, the report implies farming of aquatic animals will create disease or enhance disease of wild fish. In fact, most diseases affecting farmed aquatic animals occur in the wild. The pathogens causing aquatic animal disease in marine species are most frequently transferred from wild fish to farmed fish.

Bureaucracy

- The Commission should clarify the purpose and proposed authority of the “non-regulatory” regional ocean councils, and the regional boards. The Report specifically states that the regional ocean councils are not intended to supplant the regional Fishery Management Councils (FMCs).² While quelling concerns for lost authority of the FMCs, the Report goes on to suggest that these regional ocean councils would have a hand in “rationalizing” the regulatory responsibilities of individual agencies that regularly must balance the need for development projects and environmental protection goals. The regional ocean councils also will purportedly mediate and resolve “disputes” among various governmental entities in the region. However, it will be difficult for a voluntary, non-regulatory council to resolve disputes between states, between federal agencies or between governmental and private groups. The Commission should avoid proposing to establish yet another duplicative oversight entity, particularly when the creation of such entities would be voluntary from region to region and their role is so poorly defined. A single overarching entity with authority to interject itself into established agency regulatory programs should have a clearly stated objective and will need a statutory mandate that modifies numerous existing regulatory programs at the state and federal levels. If the voluntary characteristic reflects a concern for creating unfunded mandates, then a decision should be made as to whether an entity with a real role is worth funding.
- The Commission should conduct additional research regarding the role of the US Department of Agriculture (USDA) in support of aquaculture hatcheries technology and operations, product processing facilities and animal health research and oversight.³ Land-based hatcheries and processing facilities will be needed to support marine aquaculture, and an effort should be made to integrate existing federal aquaculture support programs with new programs needed for offshore marine aquaculture.

Code of Conduct⁴

- Creation of a marine aquaculture industry in the exclusive economic zone will not occur if the regulatory framework is unpredictable, or creates uncertainty for prospective entrepreneurs or those who would finance such endeavors. The Code of Conduct has been variously described from time to time, in conflicting terms, as a policy or guidance document that is not enforceable, or as a standard that must be satisfied in designing and operating an offshore facility. Both the United Nations Code and NOAA's draft Code specifically state that they are voluntary measures. As a potential regulatory standard, the broad, inexact language of NOAA's draft Code presents a significant hurdle to identifying the standards that must be met by an offshore facility. Personal interpretations of the Code can vary wildly from person to person in federal agencies.
- Recommendation 22-4 of the Commission's Preliminary Report⁵ urges "adherence" to the Code and perpetuates the difficulties in interpreting how the Code would be used and whether or not a facility must comply with the Code. The Commission's recommendation should be corrected to reflect the voluntary nature of the Code, and should recommend that formal rulemaking be used to incorporate any Code "requirements." It is important to remember that the current draft Code has not been subjected to the numerous federal rulemaking standards applied to enforceable legal requirements, including an evaluation of constitutional standards for vagueness or an analysis of the cost of compliance with the Code.
- The Commission should reconsider elements of Recommendation 19-26⁶ with respect to market and financial incentives that would be offered to other nations and their aquaculture industries for compliance with the U.N. Code of Conduct for Responsible Fisheries. The Commission report suggests creating incentives for such compliance by foreign operations, including "greater access to U.S. markets, bilateral aid, debt forgiveness, subsidies, and preferential loans for cooperating nations, as well as disincentives for those that do not implement these agreements."⁷ As noted, the Code is not a credible regulatory compliance standard in itself, and compliance would be difficult to measure. More importantly, it would appear contrary to the development of a U.S. marine aquaculture industry to offer such advantages to foreign competitors simply for compliance with the Code of Conduct. Such support programs should be considered as options for development of a U.S. industry in the exclusive economic zone, rather than a benefit bestowed on foreign competitors.
- The Commission should specify if Recommendation 19-25 regarding development of a National Plan of Action for the United States that implements the U.N. Code of Conduct for Responsible Fisheries includes the provisions for aquaculture. If so, it would be more appropriate to indicate the proposed NOAA Code which is an adaptation of Chapter 9 of the U.N. Code to the U.S. program. In addition, the Commission should indicate how such a National Plan of Action would be integrated into the rest of the ocean management program.

Education Programs for Aquaculture

- The Commission should call upon the aquaculture industry to assist in development of ocean-related education programs, and internship, mentoring and partnering opportunities as part of efforts by the Office of Ocean Education to create professional development and career opportunities as well as general public education experiences in aquaculture.⁸

Federal Law Clarifications Necessary

- In Chapter 6, the Report states that the Clean Water Act authorizes the U.S. Environmental Protection Agency to require discharge permits for aquaculture facilities in the exclusive economic zone.⁹ The Report's Primer on Ocean Jurisdiction states the concern that the relevant definitions of the Clean Water Act limit the jurisdiction of the Act to just three miles of the territorial sea.¹⁰ This apparent contradiction is understandable, as some of the USEPA's own documents perpetuate this confusion. However, the Commission does not make any recommendations to address this concern. The Commission must recommend that Congress address this gap in Clean Water Act authority by either specifically extending jurisdiction the Clean Water Act discharge permit program to aquaculture facilities in the entire exclusive economic zone (under 33 USC 1343, for example), or confirm that such facilities are not subject to Clean Water Act permit requirements. Offshore facilities could not be developed without a clear determination of the applicable discharge permit responsibilities for such projects. The Commission's failure to focus congressional attention on this issue will leave the matter to a resolution by the judicial branch and likely create an insurmountable barrier to marine aquaculture.

Fishery Management Program

- The Report notes that NOAA asserts that the harvest of aquaculture species is subject to the Magnuson-Stevens Fisheries Management Act.¹¹ As a result, potential marine aquaculture facilities presently would be subjected to a tortured application of exempt fishing permit procedures in order to provide the legal fiction for establishing "investigative" facilities in federal waters. Any meaningful efforts to facilitate marine aquaculture must include amendment of the Magnuson-Stevens legislation to exclude aquaculture from fisheries management regulatory procedures, and the Commission should make clear the need to undertake such change.
- The Regional Fishery Management Councils should be formally authorized to provide comments on all applications for development of aquaculture facilities in federal waters of the exclusive economic zone.

- Congress should amend the Magnuson-Stevens Act to provide governors with an appointment position slotted for an aquaculture industry representative to the regional fishery management council. Such a position would provide much needed aquaculture industry insight to assist the Councils in providing comments on both aquaculture projects and the management of capture fishing programs.¹²

Invasive Species Taskforce

- The Commission should recognize the contributions made by state participants and urge reauthorization of the Aquatic Nuisance Species Task Force. Both the NOAA and the USDA should be included in the ANSTF, and Task Force efforts coordinated with a new National Ocean Council to address marine species rather than creating a duplicative role for the National Ocean Council in the regulation of ballast water and control of invasive species.¹³
- The Commission should urge Congress to direct enhanced coordination amongst the federal and state programs to control aquatic animal diseases and attempt to develop unified standards for commerce in marine aquaculture-raised products to facilitate trade standards amongst the states and with foreign trading partners.

Lease and Permit Issues for Aquaculture Facilities

- As noted in the Commission's Report, the aquaculture industry supports an infrastructure of feed mills, processing plants, and equipment manufacturers in addition to those directly employed in aquaculture. Related transportation, communications, technology, restaurant and retail food industry interrelations should also be noted. States are always seeking out the next drivers of economic growth, and marine aquaculture may present such an opportunity. Generating federal revenues from leasing offshore aquaculture sites ("resource rents") should not be a priority, and should not be allowed to create an impediment to establishing a viable new industry and local economic opportunity. The NAA recommends that the Report note that rents collected from different types of facilities in the exclusive economic zone should be reasonable in light of the public purposes of the facility and that such rents not create a barrier to fulfilling the public purpose of seafood self-sufficiency for the United States.¹⁴
- The Commission appropriately notes the need to ensure that funds are available for the proper closure of marine aquaculture facilities.¹⁵ However, it would be a serious mistake to only identify the use of a bond as the means of providing assurance of proper closure of facilities. Other federal regulatory programs intended to address similar closure objectives provide a variety of alternative measures thought to be equally appropriate including bonds, letters of credit, standby trust agreements, closure insurance policies and

corporate guarantees. The specifics of such requirements should either be left to rulemaking or the range of possible options broadened to provide other examples.

Offshore vs. Nearshore Aquaculture Development

- Chapter 22 suggests that future marine aquaculture development be limited to the Exclusive Economic Zone where user conflicts and impacts can be minimized. Many of the states have vibrant, sustainable and environmentally responsible aquaculture industries currently located in nearshore waters. These industries are invaluable to rural coastal economies harmed by the declines in wild fishery resources. With appropriate research and development support and facilitation for comprehensive aquaculture planning under the CZMA these industries can continue to thrive and expand. They are far better positioned to contribute to the immediate expansion of aquaculture production in the U.S. than offshore where the technology and permitting by in large have yet to be developed. Key to the survival of this nearshore aquaculture, particularly the shellfish industry is implementing all of the recommendations contained in Chapter 14 regarding protecting and improving water quality.

Management Structure for Aquaculture

- The Report's conclusions notwithstanding, the number of state or federal agencies that participate in a framework for offshore aquaculture is not the source of anticipated difficulties.¹⁶ Multi-agency oversight has been a fact of life for businesses in this country for decades. For example, even gasoline service stations are subject to a variety of local, state and federal regulations and must deal with numerous different program offices. The real barrier to development of offshore facilities will be providing numerous different offices with potential veto authority, or putting any lead agency in a position where they must resolve internal conflicts by program offices with conflicting objectives.
- The Commission should not simply focus on consolidation of authority in one agency without a corresponding directive to make the aquaculture policy consistent across programs administered by that agency.

Precautionary Principle and Precautionary Approach

- The Commission recommends that the National Ocean Council should develop procedures for the application of the precautionary approach.¹⁷ The Commission Report itself applies the precautionary approach; curiously, without attribution.¹⁸ The precautionary principle and precautionary approach are restated and interpreted in a

nearly unimaginable number of different ways in numerous publications. In order to avoid confusion and possible misinterpretation of the Commission's own position, the Commission should explicitly recite the precautionary principle and precautionary approach that are referenced in the Report. In the interest of full disclosure, the Commission Report should also cite the precautionary principle or precautionary approach when language of those standards is applied in the Report.

- The Commission Report should also confirm that the precautionary approach itself is not intended to prohibit projects unless they would create specific identified irreversible adverse impacts. The precautionary approach does not require a project proponent to prove that each hypothetical adverse impact alleged by project opponents would not occur. Perpetuating incorrect interpretations of the precautionary approach or the use of inexact paraphrasing of the doctrine to emphasize potential negative effects of facilities not yet established will create a significant obstacle to development of marine aquaculture.

Research Priorities and Advisory Councils

- The funding of federal research in marine aquaculture production should be directed to development of practical information required for domestic commercial production. The effective participation in funding decisions by members of the U.S. aquaculture industry should be a central component of such a funding program.
- The Commission should recommend the creation of an Industry Advisory Board to set research priorities for the National Marine Fisheries Service Laboratories and federally funded competitive grants similar to the USDA/ARS program.
- The Commission should amend its discussion of Recommendation 4-5 to include a specific suggestion to include aquaculture representatives in the group of private sector appointments to the Presidential Council of Advisors on Ocean Policy.¹⁹ While the Commission certainly may also choose to suggest other industry representation in the private sector group, specific mention of aquaculture is important as it is the least developed industry currently operating in the marine environment in most regions, and coordination with policy advisors will be most critical to development of a marine aquaculture industry in the United States.

USDA Role

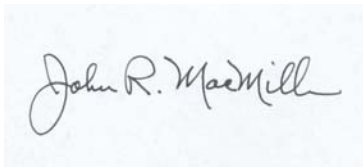
- Remarkably, the single federal agency with the greatest level of experience in U.S. aquaculture production is presumed to have no role in a future marine aquaculture industry in the United States. The Commission makes just two recommendations with respect to the USDA, both concerning non-point source pollution from terrestrial agriculture. The Commission has failed to consider the importance of the USDA's numerous aquaculture support programs that would be sought out by potential fish

Public Comment on Preliminary Report
U.S. Commission on Ocean Policy
June 3, 2004

farming proponents for EEZ projects. Unless the Commission proposes to fully duplicate the animal health, loss compensation, production research, financial support, “crop” insurance, and extension services programs currently available from the USDA, the Commission must acknowledge the importance of such USDA programs to potential marine aquaculture facilities, and urge the Departments of Agriculture and Commerce to coordinate their programs to support development of this new industry.

Thank you for this opportunity to provide our comments. Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in cursive script that reads "John R. MacMillan". The signature is written in dark ink on a light blue background.

John R. MacMillan, Ph.D.
President

Public Comment on Preliminary Report
U.S. Commission on Ocean Policy
June 3, 2004

¹ U.S. Commission on Ocean Policy, Preliminary Report (hereinafter “Report”), p. ____.

² Report, p. 59; see also Recommendation 4-10.

³ Report, Recommendation 22-1

⁴ Report, Recommendation 22-4

⁵ Id.

⁶ Report, Recommendation 19-26

⁷ Report, p 247.

⁸ Report, Recommendations 8-4, 8-6 to 8-16.

⁹ Report, p. 65.

¹⁰ Report, p. 43.

¹¹ Report, p. 65.

¹² Report, Recommendation 19-12.

¹³ Report, Recommendations 17-1, 17-3, 17-4, 17-5.

¹⁴ Report, pp. xii, 66, 376; Report Recommendations 6-2, 22-2, 30-1.

¹⁵ Report, p. 273, see Recommendation 22-2.

¹⁶ Report, p. 270.

¹⁷ Report, p. 49.

¹⁸ Report, p. 64.

¹⁹ Report, p.50; Recommendation 4-5.